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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL - 7 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

MOBILEMEDIA CORPORATION

Applicant for Authorizations
and Licenses of Certain Stations
in Various Services

WT Docket No. 97-115

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Triad Cellular Corporation, on its own behalf and on behalf of its various affiliates (collectively, "Triad")^{1/}, hereby petitions the Commission to reconsider in part the recent Order in MobileMedia Corporation, FCC 97-197, released June 6, 1997 (the "Stay Order"). Specifically, Triad asks the Commission to narrow the scope of Paragraph 18 of the Stay Order so that it will not have the result of freezing or delaying the processing of the pending applications seeking consent to the assignment to Western Wireless Corporation ("Western") of Triad's cellular radiotelephone and related microwave stations. The following is respectfully shown:

^{1/} Triad's licensee affiliates are: Triad Minnesota, L.P., Triad Oklahoma, L.P., Triad Cellular, L.P., Triad Texas, L.P. and Triad Utah, L.P.

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List A B C D E

I. Background

1. On October 15, 1997, MobileMedia Corporation ("MobileMedia"), a publicly-held paging company with the second largest number of units in service in the United States, voluntarily reported to the Commission the results of the company's internal investigation of serious licensing irregularities regarding the company's operations. The report disclosed a large number of filings by MobileMedia with the Commission falsely certifying the completion of construction of facilities that were not in fact in service.^{2/} The Commission cancelled all of the authorizations and applications which were improperly certified^{3/} Thereafter, the Commission issued an Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing For Forfeiture, FCC 97-124, released April 8, 1997 (the "Show Cause Order"), initiating a hearing in which the licensee qualifications of MobileMedia were placed in issue. All of the licenses of MobileMedia and its commonly-controlled subsidiaries were listed as being

^{2/} The false certificates were exacerbated by the fact that the company used non-existent facilities as the basis for so-called "40 mile" expansion applications (i.e. new sites which could only be established under the Commission's rules within 40 miles of a constructed and operating site.)

^{3/} Public Notice, DA 97-78, released January 13, 1997. In all, more than 250 MobileMedia authorizations were cancelled and nearly 100 40-mile rule applications were dismissed.

subject to the Show Cause Order, but no licenses of any other carrier were placed in issue.^{4/}

2. MobileMedia is now in bankruptcy and requested of the Commission that the hearing proceeding be stayed pending a reorganization and a "Second Thursday"^{5/} showing that the public interest would be served by allowing the revocation proceeding to be terminated and the licenses in question to be assigned to an uninvolved third party in order to protect innocent creditors, and the interest of the public in continuity of service. The Commission granted the requested relief in the Stay Order, but placed certain conditions on the relief. For example, the Commission conditioned the stay on MobileMedia's representation that no MobileMedia stock, which had plummeted in value and had been delisted from the NASDAQ National Market, owned by officers and directors would be transferred or sold during the pendency of the stay.^{6/} Additionally, the Commission ruled, in Paragraph 18 of the Stay Order which is the subject of this petition for partial reconsideration, that:

4/ As is discussed in greater detail within, no application of Western or of Triad was included in the Show Cause Order.

5/ See Second Thursday Corp., 22 FCC 26 515, recon. granted, 25 FCC 2d, 112 (1970).

6/ Stay Order, Para. 17

we instruct Commission staff in all Bureaus and Offices that any radio applications in which . . . former or current officers, directors or senior managers [of MobileMedia] have attributable interests shall not be granted without resolution of [the] issue [as to whether such persons have engaged in wrongdoing] . . . [T]o the extent a Bureau or Office recommends that any application in which such individual holds an attributable interest should be granted, it shall refer the matter to the Commission for disposition.

3. Triad is an entrepreneurial company^{7/} which owns and operates cellular radiotelephone properties in twelve Rural Service Areas ("RSAs") in the states of Minnesota, Oklahoma, Texas and Utah.^{8/} The company serves in excess of [number of units], many of which are in remote areas where wireline telephone services are unavailable.^{9/} Triad has no officers, directors or shareholders in common with MobileMedia.

^{7/} The day-to-day operations of Triad are run by Barry Lewis, the President and a director of Triad. Mr. Lewis is a communications entrepreneur with substantial wireless operating experience. Mr. Lewis holds significant voting interests in Triad and, along with the other entrepreneurial members of the management team (Craig Viehwig, Chief Financial Officer, and Terry Purvis, Chief Engineer) holds a significant equity stake in Triad.

^{8/} Two markets include the MN-7, MN-8 and MN-9, TX-1, TX-2, TX-4 and TX-5, OK-7 and OK-8 and UT-3, UT-4 and UT-6.

^{9/} For example, Triad provides cellular service in remote portions of San Juan County in the Utah 6 RSA.

4. Triad competes in its markets with certain larger companies which have been able to consolidate cellular properties that cover larger contiguous geographic areas than those of Triad. Triad also now faces competition from PCS licensees whose areas of authorization encompass large Basic Trading Areas ("BTAs") or Major Trading Areas ("MTAs"). In part because of this competitive environment, Triad entered into an agreement to sell its cellular and related microwave facilities to Western, which was a natural buyer of the Triad properties because it operates in many contiguous geographic areas. The resulting assignment of license applications have been accepted for filing by the Commission^{10/} and are awaiting Commission action. The public interest will be served by the proposed consolidation.

5. Shortly after the release of the Stay Order, Triad was notified by Western that the Commission was interpreting Paragraph 18 of the Stay Order as placing a de facto freeze on the processing of any and all Western applications, **including the Triad assignments**. While Western is not controlled by MobileMedia, or by any officer, director or shareholder of MobileMedia, it does have a non-

^{10/} See, e.g., Public Notice, Report No. LB-97-36 released May 30, 1997, listing applications 02549-CL-TC-97 through 02561-CL-AL-97.

controlling institutional investor (Hellman & Friedman Partner II, L.P. and certain affiliated funds collectively referred to hereafter as "Hellman & Friedman") that holds voting control of MobileMedia. To the best of Triad's knowledge, Hellman & Friedman has not been identified as a result of the Commission's investigation as an active or knowing participant in the false MobileMedia certifications that were filed with the Commission.

II. Triad Should Be Accorded Standing

6. Based upon the foregoing, Triad has a concrete adverse interest in the ruling in Paragraph 18 of the Stay Order, and should be accorded standing as an interested party to seek reconsideration of the breadth of the stay which was imposed by the Commission without notice to Triad. Absent relief, the practical effect of the stay will be to delay indefinitely Commission action upon the Triad/Western assignment. This will not only cause economic harm to Triad, but also will harm the public by leaving the Triad stations "in transition" for an extended period of time. As is discussed in detail within, the wireless business is in a very dynamic phase, and it does not suit the competitive demands of the marketplace for stations to be on hold indefinitely.

7. Triad's petition in this ancillary aspect of the MobileMedia proceeding for the limited purpose of seeking relief from the adverse impact of the stay on the Triad/Western agreement transaction should be considered timely. The Triad/Western transaction was signed prior to any indication that the MobileMedia revocation proceeding inhibited Western's ability to process cellular applications. It was not until Triad was advised that the Commission interpreted Paragraph 18 of the Stay Order as imposing a freeze on any and all Western applications that Triad had a cognizable interest in the MobileMedia proceeding. This petition is filed within the time period for seeking reconsideration of the Stay Order. Thus, Triad should be deemed to have raised the matters herein at its first opportunity to do so.

8. The fact that requests for reconsideration of interlocutory orders in hearing proceedings are not usually entertained should not act as a bar to the relief Triad is seeking. Since Triad is not -- and had no reason to be -- a party to the MobileMedia hearing^{11/}, it had no opportunity to participate in the proceedings that preceded the

^{11/} Triad understands that the General Counsel's office has indicated that it will entertain requests for reconsideration to the Stay Order by non-parties who are adversely affected. If this is incorrect, Triad respectfully seeks party status, for good cause shown.

imposition of the stay, and no notice of the scope of the freeze that was ultimately imposed. Fundamental fairness requires that Triad be given an opportunity to be heard. Under these circumstances, immediate reconsideration of the Stay Order is fully justified.

III. Acquisitions Should Be Exempted From the Freeze

9. Triad endorses the position taken by Western in its "Emergency Petition For Limited Reconsideration or Clarification" filed July 3, 1997 that the Commission should modify paragraph 18 of the Stay Order or clarify that it does not apply to Western. The grounds for removing Western from the ambit of the stay are particularly compelling with respect to the Triad/Western assignment applications. As the Commission has recognized in a variety of contexts, assignment applications present unique public interest issues that merit special consideration.

10. The acceptance for filing of an assignment or transfer of control application gives notice to every competitor in the marketplace that the station to be assigned or transferred is in transition. Attempts to raid customers and personnel during these transition periods are commonplace because a station whose ownership is "in play" is considered vulnerable. Stations operating under a contract of sale also can be slower to react to changes in

the competitive marketplace because most purchase and sale agreements contemplate that the subject station will continue to be operated in the "ordinary course of business".^{12/} Given these real world considerations, there are valid public interest reasons for the Commission to expedite its consideration of assignment and transfer applications.

11. A review of relevant Commission rulings confirms its consistent commitment to processing assignment and transfer applications on an expedited timetable. The agency has long had a separate, accelerated processing line for applications involving ownership changes.^{13/} And, many decisions specifically note that the public interest is not served when applications for assignment or transfer are not acted upon promptly. For example, in the leading case of

^{12/} Triad does not mean to suggest that its commitment to public service has waned, or that it has in any fashion relinquished control of its stations to Western. Triad merely is alluding to the practical realities, which have previously been acknowledged by the Commission, when a station is under contract.

^{13/} For example, the Wireless Bureau recently released a public notice announcing the internal processing guidelines it was using to expedite action upon assignments and transfers. Public Notice, DA 95-2559, released October 13, 1995. The result is that such applications routinely are processed more quickly than new or modified facility applications.

Grayson Enterprises, 79 FCC 2d 936 (1980), the Commission observed:

Deferral of an assignment application can have an adverse impact on the community in which a station is located. By filing an assignment application, the [licensee] has announced to its employees and the public that it no longer wants to operate the station. A deferral of that assignment ... may result in the deterioration of service to the community. The licensee will probably be reluctant to invest any new resources or effort in improving service after it has negotiated a deal with the buyer. The performance of employees at the station to be sold may also be impaired if they are asked to work for a considerable time under an employer who has announced its intention to leave the station...

Id. at para. 8. Based upon this analysis, the Commission ruled in Grayson that, in reviewing assignments involving parties to a revocation proceeding, the Commission must balance its general long term interest in deterrence of wrongdoing with the immediate interest in getting licenses of operating stations promptly into the hands of those who are in a position to operate the station in the public interest on a long term basis. Id. at para 9. Accord Cellular System One of Tulsa, 102 FCC 86 (1985) (Commission must balance the public interest considerations favoring the free transferability of licenses against the long term interest in deterrence.)

12. In light of these considerations, the Commission should **at the very least** exempt from the stay any and all acquisitions of facilities by Western. Under the circumstances at hand, the public interest benefit in having assignment applications processed promptly exceeds any deterrent benefit of having all applications to which MobileMedia principals are parties placed on hold. Indeed, since no one from MobileMedia is in a position of control or involved in the day-to-day operations of Western and/or Triad, there is no demonstrated need for deterrence with regard to the Western operations or the Western/Triad assignment, which clearly tips the scale in favor of allowing the Triad licenses to be assigned without undue delay.

IV. The Scope of the Freeze is Contrary to Precedent

13. The question of whether misconduct by a licensee in connection with certain licensed stations will be ruled to adversely affect other "uninvolved" stations has been faced by the Commission many times, and a considerable body of law has developed on the subject. The leading case is Grayson, in which the Commission held:

the basic issue is will be whether there is a **substantial likelihood** that the allegations warranting designation for hearing bear upon the operations of the other stations. If, after considering all of the particular facts and

circumstances, the Commission concludes that there is a **substantial likelihood** that the allegations bear upon the operations of other stations, it will take appropriate action to advise the [licensee] that assignment applications will not be entertained.

Grayson, supra, at para. 10 (emphasis added). Notably, the doctrine announced in Grayson provided that the Commission would settle the issue regarding the impact of the hearing on other related licenses **at the time of the designation for hearing**. Indeed, in James S. Rivers, 48 Fed. Reg. 8585 (March 1, 1983), the Commission modified the Grayson policy to require designation of all potentially affected stations for hearing if the charges are serious enough to implicate "uninvolved" facilities.^{14/}

14. Several considerations compel the conclusion that the conduct at issue in the MobileMedia proceeding should not be deemed to prevent the processing of applications, particularly assignment applications, involving Western. First, to date there has been no finding, preliminary or otherwise, that Hellman and Friedman was an active participant in the wrongdoing of MobileMedia.

^{14/} Based upon this precedent, the failure to name Western or any Western licenses as being subject to the Show Cause Order should be deemed dispositive of the Triad Petition for Partial Reconsideration, and the stay should be lifted as to all Western applications including the Triad/Western assignment.

Consequently, the Commission can find no substantial likelihood that the false filings at issue in the MobileMedia case are likely to crop up again in other companies in which Hellman & Friedman has an interest.

15. Second, since Hellman & Friedman is not in a position to control the day-to-day operations of Western, there is absolutely no basis to conclude that Hellman & Friedman's participation in Western is likely to lead to rule violations. Thus, even if Hellman and Friedman had been identified as a wrongdoer in the MobileMedia case -- which has not occurred -- the Commission could not find a substantial likelihood that this conduct would be repeated by Western in which Hellman & Friedman holds only a minority non-controlling position. In this regard, Triad notes that Western is a licensee of long standing with a substantial record of public service.

16. Third, since the Commission did not identify Western's licensee qualifications as being in issue when it designated MobileMedia for hearing, and did not identify any Western licenses as being subject to the outcome of the hearing, the application of the Grayson doctrine as modified by James S. Rivers compels a finding that Western's applications and licenses are not properly placed in issue by the Stay Order. Had the MobileMedia revocation

proceeding been fully adjudicated and resolved adversely to MobileMedia, the only immediate sanction that could have been imposed would have involved the MobileMedia stations which were designated for hearing in the case. Having decided for valid public interest reasons to stay the MobileMedia proceeding with no preliminary or final determination of wrongdoing by Hellman & Friedman, the Commission cannot and should not extend the reach of the proceeding to uninvolved stations and licensees.

V. The Commission Retains Jurisdiction

17. The issue of whether a revocation proceeding involving one station affects the assignment or transfer of an "uninvolved" station generally arises when the licensee, or principals of the licensee, involved in the identified wrongdoing are seeking to sell an uninvolved station. See, e.g. Grayson, supra, Cellular System One Of Tulsa, supra, Straus Communications, Inc., 2 FCC Rcd. 7469 (1987). This factual scenario raises sensitive public interest issues because a party who lacks basic licensee qualifications could end up profiting from the sale, and the wrongdoer's holdings in the uninvolved station would, after the Commission-approved sale, become beyond the reach of the Commission in an enforcement action.

18. No such issues pertain to the proposed acquisition of Triad by Western. Since Triad has no officers, directors or shareholders in common with MobileMedia, allowing Triad to benefit from the sale of the stations it has worked long and hard to develop raises no issue of unjust enrichment. All that will have happened is that the number of Western stations in which Hellman & Friedman has an interest -- and which remain subject to the Commission's continuing enforcement authority in the unlikely event that additional sanctions against Hellman & Friedman are necessary and appropriate^{15/} -- will have increased. Thus, allowing the Triad/Western assignment to go forward does not in any way undermine the deterrent authority of the Commission, or reduce its jurisdiction to enforce an appropriate sanction against Hellman & Friedman.

VI. Less Severe Sanctions Have Been Imposed in Other Related Circumstances

19. Triad appreciates the severity of the misconduct that is at issue in the Mobilemedia proceeding. Yet, the conduct is not completely unprecedented in either nature or scope. And, there are potentially mitigating

^{15/} It is well established that the Commission has the authority to take action against the owner of other related stations if the record after a hearing discloses conduct more serious than initially perceived. See Grayson, supra, 79 FCC 2d at 940.

factors at play in the Mobilemedia case that were not present in other instances of serious licensee wrongdoing. For these reasons, the Commission, in fashioning an appropriate regulatory response to the situation, should not abandon the measured, balanced approaches that have been taken in other cases.

20. The core conduct at issue in the Mobilemedia case is falsely certifying the operational status of stations in order to preserve licenses and qualify for additional facilities. Similar conduct was at issue in the radio common carrier revocation proceedings involving Otis L. Hale d/b/a/ Mobilfone Communications^{16/} and PassWord, Inc.^{17/}. While the Commission did ultimately decide that this conduct was sufficiently egregious to warrant the revocation of all commonly-controlled stations of the wrongdoer, it did not extend the sanction to other station licenses in which principals had non-controlling attributable interests. Since, the MobileMedia Show Cause Order already sweeps within its ambit all of MobileMedia's stations, including uninvolved stations, the approach the

16/ See Otis L. Hale, 89 FCC 2d 400 (1985) and related cases cited therein.

17/ PassWord, Inc. 76 FCC 2d 476 (1980), recon., 86 FCC 2d 437 (1981), aff'd sub nom. PassWord, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982).

Commission has taken is consistent with the hard line taken in earlier wireless false certification cases without involving Western or Triad.

21. To be sure, the number of false filings made by MobileMedia was substantial, but this too is not unprecedented. In CC Docket Nos. 82-587 through 82-590, the Commission designated for hearing over 600 paging applications in approximately 50 major markets throughout the United States to determine whether the Graphic Scanning Corporation ("Graphic") was the undisclosed real party-in-interest behind the applications.^{18/} In an Initial Decision, FCC 85D-3, released January 9, 1985, the administrative law judge found that Graphic was indeed the real party-in-interest behind the applications, and that the "straw-men" applicants and Graphic were lacking in candor and intentionally misrepresented material facts to the Commission. Despite the scope of the false filings and the severity of the adjudicated conduct, the Commission ultimately decided to limit the sanction to the dismissal of the fraudulent applications. ASD Answer Service Inc. et al., FCC 86-519, released November 21, 1986. In a

^{18/} Due to the Commission's processing rules, Graphic was not eligible in its own right to file for the requested stations, and thus created a series of "strawmen" to file on its behalf.

particularly instructive ruling, the Commission decided that the wrongdoing at issue with respect to the paging applications and licenses would not be imputed to cellular licenses in which Graphic had an interest:

We note that the conduct which concerns the Commission in [the ASD proceeding] was limited to radio paging services. It did not involve cellular radio, a service whose exceptional importance has been recognized repeatedly by the Commission. . . . [T]he imposition of restrictions or conditions on the transfer of [Graphic's cellular] interests threatens to frustrate the public interest in the development of efficient and competitive cellular systems. Balancing these public interest considerations favoring the rationalization and realignment of cellular interests (to promote efficient operation and effective competition) against our interest in deterrence . . . we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems.

Cellular System One of Tulsa, 102 FCC 2d 86, Para. 10 (1985).

22. The same reasoning compels the conclusion that the public interest benefits of allowing the Triad/Western assignment to proceed without delay far outweigh any deterrent value of holding all Western licensing in abeyance. The authorization of MTA-based PCS systems has increased the need for adjacent cellular systems to consolidate in order to remain competitive. And the

costs associated with the conversion to digital cellular technology have increased the economies of scope that must be achieved for cellular systems to compete effectively. If anything, the public interest benefits in allowing cellular consolidations to proceed have increased, not decreased, over time.

23. The Commission also should note that there are possible mitigating factors involved in the MobileMedia case that were not at work in prior wireless revocation proceedings. The licensing violations at issue in the Mobilemedia case were voluntarily disclosed to the Commission. In contrast, the serious wrongdoing at issue in the Otis Hale, PassWord and ASD proceedings was brought to the Commission's attention by third parties, and was initially denied by the licensees. If anything, the voluntary disclosure by MobileMedia should lead to a less severe rather than a more severe outcome with respect to uninvolved stations.

24. Additionally, the Commission should note that Hellman & Friedman, the largest economic interestholder in Mobilemedia, already has suffered huge financial losses as a result of the collapse of the MobileMedia stock price and the fact that the company was forced into bankruptcy. Interrupting the Triad/Western sale is not necessary to

punish Hellman & Friedman (if indeed such punishment is warranted which it has not been shown to be.) If the Commission insists on dragging the Triad/Western assignment into the ambit of the Stay Order, all it will have succeeded in doing is adding other completely innocent parties (i.e. Triad principals and Western shareholders other than Hellman & Friedman) to the list of those innocent third parties who have already been victimized by the wrongdoing in the Mobilemedia case.

CONCLUSION

The foregoing premises having been duly considered, Triad respectfully requests that Paragraph 18 of the Stay Order be modified, limited or clarified in order to permit the Triad/Western assignment applications to be processed and granted by the wireless Telecommunications Bureau without further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharon L. Henry, a secretary in the law offices of Paul, Hastings, Janofsky & Walker LLP, do hereby certify that I have on this 7th day of July, 1997, had copies of the foregoing Petition for Partial Reconsideration sent by first-class postage pre-paid mail or by hand-delivery^{19/} to the following:

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